IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 389 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

H.H.PANDYA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 389 of 1982

MR PV HATHI for Petitioner No. 1

MS. DS PANDIT A.G.P. for Respondent No. 1

MR KH BAXI for Respondent No. 2

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 20/08/2002

ORAL JUDGEMENT

1. The petitioner's grievance in this petition is that though he was eligible for promotion to the post of

Executive Engineer from the post of Deputy Engineer his claim for promotion was ignored by the respondents and the Deputy Engineers junior to him were promoted before him. His further grievance is that later on even after granting him promotion to the said post his request to grant him appropriate deemed date has not been acceded by the respondents.

2. Certain relevant facts for deciding this petition can be in short stated as under :-

2.1. The petitioner was appointed in the employment of respondent no.2 as Junior Engineer with effect from 2nd February, 1965. He was thereafter promoted as Deputy Engineer vide order dated 23rd October, 1969 and he was also permitted to cross efficiency bar on 29th February, 1980. The seniority list meant for Deputy Engineers was published and on the said list the petitioner was shown at Sr. no.12. In and around January, 1982 need to promote the Deputy Engineers to the post of Executive Engineers arose and at that time, the petitioner was not given the promotion but about four to five Deputy Engineers who were junior to him were promoted. It is the say of the petitioner that even in 1981 about six Deputy Engineers who were junior to the petitioner were promoted to the post of Executive Engineer ignoring the legitimate claim of the petitioner for promotion to the said post. It is the say of the petitioner that his record of service all throughout was clean and that he had efficiently discharged his duties. Inspite of that he was superseded by his juniors for no obvious reason. According to the petitioner the fact that he performed his duties efficiently can be supported by his service record which shows that on all occasions he was allowed to cross efficiency bar. On 1st October, 1974, the petitioner was allowed to cross efficiency bar for the first time and the second efficiency bar was permitted to be crossed with effect from 1st October, 1980. His say is that during all these period no adverse remarks had been passed against him. He has, therefore, submitted that there was nothing against him which could prompt the respondents to ignore his claim for promotion and to grant promotion to his juniors. It is his case that in the year 1980 two petitions were filed before this Court being Special Civil Application no.3015/1980 and Special Civil Application no.3443/1980 wherein this Court had restrained the respondents from operating the aforesaid seniority list. However, with the permission of this Court several promotions came to be released on 9th May, 1981 and 3rd June, 1981 whereby six persons came to be promoted only on temporary and ad-hoc basis and subject

to outcome of those petitions on the post of Executive Engineers. Those promotions were granted without prejudice to the rights of the persons that may have arisen under the aforesaid seniority list. It also appears from the record of the petition that about eight persons came to be promoted from the said list to the post of Executive Engineer. These promotions were made after obtaining permission of this Court in view of the fact that about ten vacancies had arisen at that time in the cadre of Executive Engineer. Even at that point of time the claim of the petitioner for promotion was not considered. In the circumstances, the petitioner has approached this Court by filing this petition on 28th January, 1982. While admitting this petition, this Court on 25th April, 1982 directed the respondents to keep one post of Executive Engineer vacant. It appears that on 21st February, 1983 a chargesheet for commencing departmental inquiry against the petitioner was served on him in respect of the incidents which had taken place in the year 1970 and 1971. The petitioner contested the allegations levelled against him in the chargesheet by filing reply on 1st March, 1983. Upon completing the inquiry, the petitioner was found not guilty of committing the acts of misconduct alleged against him in the chargesheet. He was, therefore, completely exonerated vide decision of the Vigilance Commissioner dated 19th March, 1986. The aforesaid finding of the Commissioner was thereafter, forwarded to the Health and Family Welfare Department of the State of Gujarat and in view of the said findings of the Vigilance Commissioner, the Deputy Secretary of the said department vide order dated 17th September, 1987 exonerated the petitioner from all the charges levelled against him. In the meanwhile, on 19th April, 1986 the petitioner was promoted to the post of Executive Engineer but he was not given the deemed date of promotion with effect from 4th January, 1982 i.e. the date on which he was superseded by his junior colleague. The petitioner, therefore, made application to the respondents to grant him deemed date of promotion. No response was however, received by the petitioner to the said application. This was followed by the reminders sent by the petitioner on different dates. Ultimately, on 16th April, 1993 the petitioner was constrained to file Civil Application no.875/1993 before this Court seeking its indulgence to permit him to bring on record the aforesaid application alongwith the reminders and also direction on the respondents to make available the order that may have been passed on the said application. This Court (Coram : K.R. Vyas, J.) passed order on Civil Application no.875/1993 filed in this petition directing the respondents to consider the

representation made by the petitioner with regard to deemed date and to pass appropriate order after hearing the petitioner in case of necessity and to intimate this Court the decision that may be taken on the said application and the representation within three weeks from the date of the said order. While passing the said order the learned Judge also expressed his surprise that though the matter had been filed in the year 1982, no affidavit-in-reply was filed by the the other side till then. The learned Judge, therefore, directed the respondents that in the event of any order passed by the respondents turning down the application for deemed date submitted by the petitioner, the respondents should file affidavit-in-reply to the petition as well the Civil Application within four weeks from the date of the order. From the record it clearly appears that no such counter affidavit either to the main petition or the Civil Application has been filed till today.

3. Ms.K.P. Hathi learned counsel for the petitioner submitted that the petitioner was not promoted to the cadre of Executive Engineers but some persons junior to him were allowed to steal march over his claim though the petitioner was equally efficient. It can be seen from the record that he was allowed to cross efficiency bar as and when occasion arose and, therefore, there was no earthly reason for the respondents not to grant him promotion at the very first opportunity even on the ground of ineffeciency. She has further submitted that when the criteria for promotion is seniority-cum-merit the seniority has to be given more weightage in the matter of promotion, if the concerned candidate is not lacking in merits. She has further submitted that there is nothing on record to show that the petitioner was meritless. According to her the petitioner was never communicated any adverse remarks during his tenure as Deputy Engineer in the service and one, therefore, can safely presume that no such remarks have been made in his Annual Confidential Report by his superior. Her submission is that the very fact that the petitioner was allowed to cross efficiency bar at the appropriate time speaks about his efficiency and ultimately he was promoted to the said post in the month of April, 1986. All these factors clearly show that the petitioner was not lagging behind in merits from his junior colleague. She has further submitted that merely because the department thought it fit to initiate inquiry against him at much belated stage i.e. in the month of February, 1983 for the alleged acts of misconduct that took place in the year 1970 and 1971, the petitioner could not have been denied the chance of promotion at the appropriate

time. According to her even in such cases, as by now it is settled principle of law that the procedure of sealed cover could have been resorted to or the petitioner could have been promoted subject to the outcome of the inquiry. Lastly, she has submitted that now the petitioner has retired on reaching the age of superannuation. The only question with regard to deemed date remains to be decided and the petitioner has made appropriate prayer in this petition on that behalf.

3.1. Ms.Darshana Pandit learned A.G.P. has submitted that considering the fact that there was departmental inquiry pending against the petitioner at the relevant time the respondents were justified in not considering his case for promotion at that time and looking to the need of time, the respondents were justified in granting promotion to the juniors of the petitioner.

4. Having carefully gone through the record of this petition, it appears that the petitioner was duly qualified and after joining the service of respondent no.2 as Junior Engineer he was promoted on 23rd October, 1969 as Deputy Engineer. As Deputy Engineer the petitioner was shown at Sr. no.12 in the seniority list for that post which came to be published on 29th February, 1980. The petitioner came to be promoted to the post of Executive Engineer with effect from 19th April, 1986. However between February, 1980 and April, 1986 as many as forty juniors of the petitioner in the cadre of Deputy Engineers were promoted to the post of Executive Engineer. The reason advanced by respondents for not considering the petitioner for promotion at the first opportunity or even subsequently cannot be accepted. According to the petitioner even in the year 1981 several Deputy Engineers were promoted by the respondents after obtaining permission of this Court in view of pendency of two petitions referred to above before this Court. These promotions were absolutely on ad-hoc and temporary basis and subject to the outcome of this petition and without adversely affecting the rights of the Deputy Engineers shown in the seniority list published in February, 1980. The petitioner could have been granted promotion at least at that stage. That was not done. Since no reason has been pointed out by the other side for denying promotion to the petitioner in 1981 and in the subsequent period till April, 1986, it clearly appears that the petitioner was wrongly denied promotion. His grievance that he should have been considered for promotion atleast from 4th January, 1982 seems to be well justified. It may be noted here that there is nothing on record to show that valid reasons

existed there for which the juniors to the petitioner were promoted superseding his claim for promotion. It may further be noted that in January, 1982 no departmental inquiry was either initiated or pending against the petitioner. Therefore, that could not be the ground for ignoring the claim of the petitioner for promotion to the post of Executive Engineer. As stated above, the petitioner was chargesheeted in the month of February, 1983 for the acts of misconducts alleged to have been committed by the petitioner way back in the year 1970 and 1971. What prevented the department to wait for all these years to initiate the inquiry against the petitioner for the said acts of misconduct is not coming forth. Even the inquiry that had been initiated against the petitioner resulted into complete exoneration of the petitioner from the charges levelled against him. This would amply support the claim of the petitioner that his entire service record was absolutely clean and blotless. If this be so I fail to understand why the prescribed criteria for granting promotion was totally overlooked in the case of the petitioner. I also find much merit in the submission made by Ms.Hathi which is adequately supported by decision of the Apex Court rendered in the case of Union of India v. K.V. Jankiraman reported in A.I.R. 1991 S.C. 2010, that the sealed cover procedure could have been resorted to only after the inquiry was initiated against the petitioner. However, considering the fact that at the time when first promotion came to be granted to the juniors of the petitioner i.e. in January, 1982, no such proceedings were initiated against the petitioner. Thus even if, initiation of departmental inquiry was in contemplation of the respondents that would not be valid reason for the respondents to withhold the promotion of the petitioner at that time. At this juncture it is necessary for me to observe that the respondents have shown culpable negligence in not filing the reply either to the petition or to the Civil Application of the petitioner despite the fact that this Court had on January 23, 1995 given specific direction to them to file such affidavit in case application of the petitioner for grant of deemed date was turned down. The very fact that till this date the petitioner has not received any favourable reply shows that his application for deemed date has been rejected by the respondents. If that be the case it was incumbent upon the respondents to file affidavit-in-reply to both the petitions as well as the Civil Application. Unfortunately the same is not done. In such miserable state of affairs, I have no alternative but to accept the prayer of the petitioner to grant him deemed date.

4.1. The next question that may arise for consideration is after the grant of deemed date what benefit the petitioner is entitled to receive. In case of the Union of India v. K.V. Jankiraman (supra) the Apex Court has laid down as under :-

> "When an employee is completely exonerated in criminal/disciplinary proceedings and is not visited with the penalty even of censure indicating thereby that he was not blameworthy in the least, he should not be deprived of any benefits including the salary of the promotional post. The normal rule of "no work no pay" is not applicable to such cases where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R.17 (1) will also be inapplicable to such cases."

5. In view of this principle of law laid down by the Apex Court the petitioner becomes entitled to receive all the benefits which would have accrued to him and be promoted with effect from 4th January, 1982. The respondents are, therefore, directed to grant deemed date of promotion to the petitioner with effect from 4th January, 1982 and also to grant him all the benefits that may accrue to him by virtue of the deemed date of promotion. Needless to say this would include the revision of pay, his claim for the next promotional post, revision of pension etc. As stated above, all the benefits that would be permissible under the law, in consonance with the aforesaid deemed date, be given to the petitioner. The respondents are also directed to carry out this exercise on or before 31st December, 2002. This petition is, therefore, allowed. Rule is made absolute. Considering the circumstances of the case and indifferent attitude of the respondents they are directed to pay costs of this petition to the petitioner and to bear their own.

[AKSHAY H. MEHTA, J.]

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